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October 25, 2016

Via U.S. Mail and E-Mail (scott.cox@co.saint-croix.wi.us)

Scott Cox, Esq.
St. Croix County Corporation Counsel
Government Center
1101 Carmichael Road
Hudson, WI 54016

Re: Vested Rights of Emerald Sky Dairy and Proposed Moratorium on
Large-Scale Livestock Facilities

Dear Attorney Cox:

We represent Emerald Sky Dairy, LLC ("Emerald Sky"). As you know, Emerald Sky is expanding its existing dairy facility located in the Town of Emerald, St. Croix County. We understand that St. Croix County's Community Development Committee referred a draft ordinance titled "Moratorium on Large-Scale Livestock Facilities" ("Moratorium") at its October 20, 2016 meeting to the St. Croix County Board of Supervisors for consideration at its November 1, 2016 meeting. While the Moratorium does not impact Emerald Sky's expansion plans, there is no doubt that it was aimed at specifically delaying, frustrating or preventing altogether the expansion of Emerald Sky. As you know, that is improper. The purpose of this letter is to make clear that the proposed Moratorium does not apply to Emerald Sky and, even if it did, the Moratorium, if adopted, represents an illegal attempt by St. Croix County to restrict livestock facilities in contravention of Wisconsin law.

I. The Moratorium Does Not Apply to Emerald Sky

Even if St. Croix County had the authority to impose a moratorium on the siting or expansion of livestock facilities (it does not), the Moratorium would not apply to Emerald Sky because it has obtained vested rights. First, on its face, the proposed Moratorium cannot be applied against an entity which has acquired vested rights prior to the adoption of the ordinance. Moratorium Section 2.05. Emerald Sky is an existing livestock facility that has already submitted applications to expand its facility. By doing so Emerald Sky has vested its right to pursue its expansion.

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Moreover, pursuant to the state's livestock siting law, a county, just like any other political subdivision, may not disapprove or prohibit a livestock facility siting or expansion unless, among other things, the proposed new or expanded livestock facility would violate a requirement that is more stringent than the state standards if the political subdivision "adopts the requirement by ordinance before the applicant files the application for approval..." Wis. Stat. § 93.90(3)6.a. (emphasis added). Emerald Sky's application was filed well before the County's proposed Moratorium was enacted (if in fact it is enacted) and a moratorium, by definition, is more stringent than the state standards. As result, Emerald Sky's rights have vested and the Moratorium will not apply to Emerald Sky.

Although the Moratorium will not apply to Emerald Sky, we have identified below why the Moratorium would unlawfully exceed the County's statutory authority and be unenforceable.

II. The County's Proposed Moratorium is Illegal and Unenforceable

a. St. Croix County does not have the authority to impose a moratorium on livestock operations.

Counties possess only those powers delegated to them by the state legislature; the state legislature has not granted counties the power to impose a moratorium on the siting or expansion of livestock facilities.

The recitals included in the Moratorium Ordinance indicate the County desires to impose a moratorium to allow the county to study (i) amendments to the County's existing zoning ordinances; (ii) the creation of a livestock facility licensing ordinance; or (iii) the creation of a livestock "operating ordinance;" and to evaluate whether the County has the resources necessary to administer such ordinances.

As authority for its power to impose a moratorium on large-scale livestock facilities, the County cites two state statutes, in particular: Wis. Stat. § 59.02(2) [Consolidation of municipal services, home rule, metropolitan district] and Wis. Stat. §59.69 [Planning And Zoning Authority]. Neither of these statutes provides counties with the authority to impose a moratorium on the siting or expansion of livestock facilities.

First, there appears to be absolutely no connection between the proposed moratorium and Wis. Stat. § 59.02. This section of the statutes deals with a county's authority "to consolidate municipal services and functions in the county" and to "to carry out these powers in districts [e.g., a sewerage district] which it may create for different purposes." The authority to provide for consolidated municipal services through a district has nothing to do with the imposition of a moratorium of any kind.

Second, section 59.69 of the statutes, which deals with a county's general planning and zoning authority, provides no explicit authority to impose a moratorium. Section 59.69(4), titled, "Extent

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of power” explains that the legislature’s grant of planning and zoning authority under chapter 59 does not allow counties to impose a “development moratorium” (defined elsewhere in the statutes as a moratorium on rezoning or certain land division approvals), though this prohibition “does not limit any authority of the board to impose a moratorium that is not a development moratorium.” Although this statutory authority could suggest that a county may have implicit authority under 59.69 to impose certain types of moratoria, a moratorium on the development of livestock facilities is not authorized.

Since counties are creatures of statute and are vested only with the powers granted to them by the state legislature (i.e., counties do not enjoy the same broad “home rule” authority given to cities and villages), the implicit authority to impose a moratorium under chapter 59.69 must relate directly to one of the enumerated powers identified in Wis. Stat. § 59.69(4). Since the siting and expansion of livestock facilities is regulated under section 93.30 of the statutes, not section 59.69, it is unreasonable to conclude that the implicit authority to impose a moratorium under 59.69 may somehow be extended to the siting and expansion of livestock facilities.

b. The proposed moratorium violates Wis. Stat. § 93.90, Wisconsin’s Livestock Siting Law.

Even if counties have implicit authority under Wis. Stat. § 59.69 to impose certain types of moratoria related to planning and zoning, section 93.90, which regulates the siting and expansion of livestock facilities, is an enactment of statewide concern, is more specific than the general planning and zoning authority found in 59.69, and provides a comprehensive set of regulations for the siting and expansion of livestock facilities preempting the exercise of any conflicting authority that might be implied under Wis. Stat. § 59.69. *Adams v. Livestock Facilities Siting Review Bd.* (“Adams”), 2012 WI 85, ¶ 31 (finding that livestock facility siting is an issue of statewide concern).

In 2003, the Wisconsin Legislature passed section 93.90 of the Wisconsin statutes (the “Livestock Siting Law”) to provide a system for uniform regulation of livestock facilities statewide. Under Section 93.90(2), the Wisconsin Department of Agriculture Trade and Consumer Protection (“DATCP”) was directed to “promulgate rules specifying standards for siting and expanding livestock facilities.” Pursuant to that authority, DATCP promulgated ATCP 51, which became effective on November 1, 2006. The Wisconsin Supreme Court has analyzed the Livestock Facility Siting Law and concluded that “the legislature expressly withdrew the power of political subdivisions to enforce varied and inconsistent livestock facility siting standards.” *Adams*, 2012 WI 85, ¶ 39.

The Livestock Siting Law does not require local governments to regulate livestock operations. However, if local governments, such as St. Croix County, choose to regulate livestock operations, the political subdivision must grant or deny approval based on the Livestock Siting Law and the regulations promulgated by DATCP. A political subdivision may not consider other

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siting criteria or apply standards that differ from the statewide regulations, except as explicitly authorized by the Livestock Siting Law or ATCP 51.

The Livestock Siting Law specifies precisely how applications for siting or expansion are to be handled, right down to the permit forms, the attachment, the filing fee, and the number of days the local government has to respond to an application.

In 2006, St. Croix County adopted livestock siting via the County's Zoning Ordinance, Chapter 17. The County's application and/or permitting process depends on the designated zoning district in which the facility is located and the number of animal units at the facility. According to the County's own "Livestock Facilities & Animal Waste Storage Facilities in St. Croix County – General Facts & Frequently Asked Questions", if St. Croix County Board of Adjustment approval is required, the political subdivision must grant or deny approval based on ATCP 51. Further, St. Croix's fact sheet notes that a political subdivision may not consider other siting criteria, or apply standards that differ from ATCP 51, except as provided in the livestock facility siting law or ATCP 51. (Fact Sheet available at the St. Croix County website, <http://www.co.saint-croix.wi.us/>). By adopting a livestock siting ordinance, the County has agreed to regulate livestock facilities pursuant to the Livestock Siting Law.

Neither Wis. Stat. § 93.90 nor ATCP 51 allows the imposition of a temporary ban on the siting or expansion of livestock facilities. In fact, the Livestock Siting Law specifies only five conditions under which a local government unit may prohibit the siting or expansion of a livestock facility (e.g., the proposed site is not in an agricultural district; the proposed facility violates a local building, electrical or plumbing code; the proposed facility violates one of the state standards for livestock facilities, etc.). Enactment of a local moratorium on siting or expansion is not one of the five circumstances under which a local government unit may refuse to permit the siting or expansion of a livestock facility.

Regardless of its duration, a temporary prohibition on the issuance of local approvals for any new or expanded livestock facility is, by its very nature, a local regulation that is more stringent than the standards set forth in Wis. Stat. § 93.90 and ATCP 51 and the County has not taken the steps necessary to implement those more stringent standards. If adopted, St. Croix County would be violating its duties under the Livestock Siting Law by essentially arguing that its own ordinance trumps state law on the issue when the Wisconsin Supreme Court has recognized the preemptive effect of the legislature's adoption of Wis. Stat. § 93.90. See *Adams*, 2012 WI 85, ¶ 39. Because the Livestock Siting Law "is an enactment of statewide concern for the purpose of providing uniform regulation of livestock facilities," (Wis. Stat. § 93.90(1)), any local regulation that is inconsistent with the terms of the Siting Law is specifically preempted and invalid. See *DeRosso Landfill Co. v. City of Oak Creek*, 200 Wis. 2d 642, 664, 547 N.W.2d 770 (1996). Since the Livestock Siting Law is unquestionably a statewide legislative enactment, any local ordinance must be consistent with the Livestock Siting Law or be deemed unconstitutional and invalid.

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The conclusion stated here – that the proposed moratorium violates the Livestock Siting Law – is the same conclusion reached by DATCP with respect to a similar moratorium proposed by Vernon County in 2007, shortly after DATCP promulgated ATCP 51. (see attached 7/17/07 Castelnovo letter) (“The moratorium ordinance apparently violates the siting law. ... We do not believe that you can make changes to the draft moratorium ordinance that will fully remedy these concerns. Our department's recommendation is that you do not proceed with your efforts to adopt a moratorium.”)

c. In addition to violating the Livestock Siting Law, the proposed moratorium also violates Wis. Stat. § 92.15 – the state law regulating the *operation* of livestock facilities.

The proposed moratorium is intended, among other things, to allow the County an opportunity to study potential water-quality impacts associated with the operation of livestock facilities so the county may decide whether to impose more restrictive regulations than the statewide standards. By its very nature, the proposed moratorium is an ordinance that regulates the operation of livestock facilities in that it prohibits virtually all expansion activity and the construction or alteration of manure storage facilities.

Pursuant to Wis. Admin. Code NR 151.096 (promulgated pursuant to Wis. Stat. § 92.15), a local government unit may not enact regulations of livestock operations that exceed state standards unless the local governmental unit first demonstrates to the satisfaction of DATCP or DNR that the more restrictive regulation is necessary to achieve certain water quality standards. In other words, the concept of a moratorium (where a local government acts before receiving DATCP or DNR approval) is contrary to the regulatory scheme imposed by the state, which requires department approval before the local government imposes more restrictive standards.

Here, St. Croix County has not submitted its proposed ordinance to DATCP or DNR. The county therefore lacks the authority to enact it.

In summary, the proposed Moratorium does not apply to Emerald Sky because the dairy's application has been filed and its rights have vested. Even if the proposed Moratorium did apply to Emerald Sky, the Moratorium is illegal and unenforceable because the County does not have the statutory authority to impose a moratorium on the siting or expansion of livestock facilities and such a Moratorium would violate the state's Livestock Siting Law.



**Michael
Best**

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Emerald Sky is doing, and will continue to do, all that is required to legally expand its dairy operations in cooperation with St. Croix County. As such, Emerald Sky is prepared to vigorously defend its right to expand its dairy, and will seek all remedies available to it under state and federal law.

Sincerely,

MICHAEL BEST & FRIEDRICH LLP



Leah H. Ziemba

Enclosure

cc: Mr. Todd Tuls

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State of Wisconsin
Jim Doyle, Governor

Department of Agriculture, Trade and Consumer Protection
Rod Nilstuen, Secretary

July 17, 2007

Jo Ann Nickelatti, Chair
County Health Committee
E1416 Cty. Rd. K
Genoa, WI 54632
608-689-2491

Dear Mrs. Nickelatti,

Our department has reviewed the Vernon County Livestock Facility Moratorium Ordinance provided to us by the county. Before turning to our concerns about the moratorium, it is important to emphasize that the county is pursuing a positive course of action by considering a licensing ordinance.

The county conservation committee and its staff have effectively worked with the department to draft the Vernon County Livestock Facility Licensing Ordinance. Unlike the draft moratorium, this tool offers a way for the county to responsibly address the issue of livestock facility siting by complying with s. 93.90, Stats. and ch. ATCP 51, Wis. Admin. Code. We encourage you to pursue this option.

However, the same cannot be said of the proposed moratorium. You should carefully consider the ramifications of imposing a county moratorium on livestock facility siting. Among other concerns, the county may be unnecessarily exposing itself to legal challenges if it adopts the proposed moratorium ordinance. Here are our specific concerns about the moratorium ordinance:

The moratorium ordinance apparently violates the siting law. Through its combination of a ban on proposed facilities and a variance procedure, the county has adopted a system to approve and disapprove the siting of livestock facilities over 500 animal units that violates s. 93.90, Stats. This violation cannot be cured by applying the siting law requirements to operators after they receive a variance.

The county apparently lacks legal authority conferred by the state to adopt a moratorium. A county cannot impose a moratorium unless it has specific statutory authority to act, and the state statutes cited in the ordinance do not support a moratorium. For example, the ordinance contains nothing equivalent to the authority for interim zoning provided by s. 62.23(7)(da), Stats., that allows a city to impose a moratorium for a limited purpose and duration.

There appears to be no legal authority for a county to impose a moratorium that temporarily controls land uses like zoning (i.e. by prohibiting new or expanded livestock facilities over 500 AU in areas where livestock operations are other allowed) when the

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county has no intention of developing a comprehensive plan and zoning to implement the plan. For example, the authority conferred by s. 62.23(7)(da), Stats. authorizes a moratorium only to preserve existing uses while the comprehensive zoning plan is being prepared.

The proposed ordinance does not meet a reasonableness test to justify a moratorium. The only purpose for the ordinance is to study criteria to regulate livestock operations in addition to those required by state law. The rights of the public can be protected without a moratorium by implementing the siting law through a local ordinance, and adding other standards in the future if they are necessary to protect public health and safety. A ban on new and expanded facilities unnecessarily restricts the rights of landowners for a very limited purpose.

The proposed ordinance appears to violate the rights of certain landowners who should be exempt from the moratorium. The moratorium should exempt any landowner who has a vested right to proceed with a proposed facility including a project for which a valid building permit has been issued. The ordinance should exclude landowners who need to make necessary repairs to structures such as manure storage facilities. If no exemptions are created for manure storage permits, the moratorium will prevent an operator from building or modifying a storage facility, even though the operator meets all requirements for a permit under s. 92.16, Stats.

We do not believe that you can make changes to the draft moratorium ordinance that will fully remedy these concerns. Our department's recommendation is that you do not proceed with your efforts to adopt a moratorium.

Please contact Mike Murray, 608-224-4613, if you need additional assistance.

Sincerely,



Richard Castelnovo
Section Chief, Resource Planning
608-224-4608

Cc: Thomas V. Spenner, Chair, Vernon County Board
Richard Hansen, Chair, Land & Water Conservation Committee
Ron Hoff, Vernon County Clerk
Kelly Jacobs, Conservationist, Land & Water Conservation Department
Atty. Gregory M. Lunde
Atty. Stephanie M. Hopkins